No. 03-106

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

THE FEDERAL DEMOCRATIC REPUBLIC OF ETHIOPIA
and THE COMMERCIAL BANK OF ETHIOPIA,

Petitioners,

v.

HIWOT NEMARIAM; BELAY REDDA; SERTZU GEBREMESKEL; MEBRAHTU GEBREMEDHIN; FEKADU ANDEMESKAL; and MEBRAT GEBREAMLAK, widow and personal representative of the estate of TEDROS ASFAHA,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether the Court of Appeals correctly held that defendants had failed to meet the well settled requirement of *Gulf Oil v. Gilbert* and *Piper Aircraft Co. v. Reyno* that a party moving to dismiss on *forum non conveniens* grounds must first establish the existence of an adequate alternative forum because, applying the equally settled teaching of *Piper*, plaintiffs had a right to "no remedy at all," even on a meritorious claim, from the interstate claims commission that defendants proferred as the alternative forum.

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BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Respondents respectfully submit this brief in opposition to the Petition for Writ of Certiorari.

STATEMENT OF THE CASE

A. Nature of the Claims

Respondents brought this action against Petitioners, the Federal Democratic Republic of Ethiopia ("Ethiopia") and the Commercial Bank of Ethiopia ("CBE") seeking recovery for themselves and a class of similarly situated individuals for Petitioners' takings of their CBE bank accounts and other property without compensation as part of Ethiopia's discriminatory campaign, including mass expulsions, against persons of Eritrean nationality, origin or descent during a two-year border war between Ethiopia and Eritrea. Respondents found the case on 28 U.S.C. § 1605(a)(3), the international takings exception of the Foreign Sovereign Immunities Act.

In May 1998, a longstanding border dispute between Eritrea and Ethiopia erupted into a general armed conflict. Pet. App. 2a. Within a month, Ethiopia began arresting, detaining and expelling people who, like Respondents, were of Eritrean nationality, origin or descent, and confiscating property they left behind. *Id.* Ethiopia ordered banks, including principally CBE, to freeze all accounts held by individuals it identified as "Eritreans," including Respondents. This action rendered the accounts inaccessible to Respondents and the class prior to their deportation and permanently inaccessible afterward, as withdrawals from

individual accounts in Ethiopia may be made only by the account-holder, in person. Without notice or process, CBE foreclosed on or otherwise seized remaining property left behind by deportees. *Id.*

In June 2000, Respondents filed a two-count complaint against Petitioners Ethiopia and CBE. Respondents, including a U.S. citizen and a U.S. lawful permanent resident who was granted political asylum from Eritrea, are individuals of Eritrean descent whose property was confiscated by Respondents in the manner described in violation of international law. Ethiopia is a sovereign state. CBE, which is wholly owned by the Ethiopian government, Pet. 2, is engaged in extensive commercial activity in the United States through, among other things, its various correspondent banking accounts, which handle hundreds of millions of U.S. dollar transactions annually for CBE from which CBE derives substantial profits. *See* First Amended Complaint, dated June 8, 2001 ¶ 30.

On December 12, 2000, six months after Respondents had filed their Complaint, Eritrea and Ethiopia entered into the Agreement between the Government of the Federal Democratic Republic of Ethiopia and the Government of the State of Eritrea ("Agreement") that formally ended the conflict. Pet. App. 2a; *see* Pet. App. 24a. Anthony Lake, President Clinton's Special Envoy, played a central role in bringing the warring states to agreement, and State Department negotiators drafted the Agreement to reflect the concerns and understanding of Eritrea and Ethiopia. Pet. App. 38a-39a; *see also* Respondents' Appendix 3a-4a, 7a-8a. Madeleine Albright, Secretary of State of the United States, and Kofi Annan, Secretary General of the United Nations, signed the Agreement as witnesses. Pet. App. 34a.

Article 5 of the Agreement created the Eritrea-Ethiopia Claims Commission to resolve claims between the two states arising from the war. Pet. App. 2a-3a. By the terms of Article 5, only the States Party to the Agreement, Eritrea and Ethiopia, may bring claims before the Commission, including claims "on behalf of [their] nationals" and "on behalf of persons of Ethiopian or Eritrean origin who may not be [their] nationals." Pet. App. 3a. The Agreement vests in the Commission exclusive jurisdiction over all claims arising from the conflict, "[e]xcept for claims . . . filed in another forum prior to the effective date of this Agreement." *Id.* The Agreement also provides that "any claims which could have been and were not submitted by [the specified] deadline [were] extinguished, in accordance with international law." Pet. App. 31a-32a.

The uncontroverted evidence in the record on appeal established that the carve-out for claims pending in another forum from the otherwise exclusive jurisdiction of the Claims Commission was sought by Eritrea and included in the Agreement specifically in order to permit this case to go forward. Resp. App. 3a-4a, 7a-8a. While Eritrea was prepared to establish the Commission as the otherwise exclusive forum for claims between the two states, it took the position in negotiations that it "could not sign an agreement that would potentially adversely affect the rights of persons of Eritrean national origin in an on-going case." Resp. App. 8a. Eritrean representatives explained its position to the State Department representative at the peace negotiations, and the State Department drafted the language in Article 5(8) that satisfied Eritrea's concern. Resp. App. 3a-4a. In that manner, "Ethiopia's agreement to this position was obtained." Resp. App. 7a.

B. Proceedings Below

On August 2, 2001, on Petitioners' motion, the District Court dismissed the complaint on the ground of *forum non conveniens* in favor of the Claims Commission. It held that the Claims Commission was an adequate alternative forum because, although Respondents could not bring claims there themselves, Eritrea could bring claims on their behalf. Pet. App. 19a-20a. The Court then found that the private and public interest factors favored the Commission. Pet. App. 20a-21a. Dismissing without prejudice, the District Court provided that "the case is subject to reinstatement for good cause shown if named plaintiffs' claims are not submitted to the Claims Commission by the government of Eritrea despite affirmative, timely request therefore [sic] by plaintiffs." *Id.*

In light of the terms of the dismissal, Respondents requested that Eritrea submit claims on their behalf before the Claims Commission. On December 12, 2001, Eritrea filed claims on behalf of each named Respondent, as well as a claim on behalf of "Persons Expelled from Ethiopia." Pet. App. 41a-76a; C.A. Joint App. A612-A705. On June 15, 2002, Ethiopia filed Statements of Defense to the claims Eritrea filed on behalf of Respondents, asserting, among other defenses, that they are not "valid claims against Ethiopia under Article 5 of the Peace Agreement." C.A. Joint App. A741-A808. Eritrea filed memorials in support of these claims in November 2002. There have been no further memorials or hearings to date.

On appeal, Respondents argued that (*i*) the Commission is an inadequate alternative forum because, even if Respondents prevail on their claims, they have no right to a remedy from the Commission; (*ii*) the Commission is an inadequate alternative forum because Respondents may not themselves file claims before the Commission and they have

no control over the claims Eritrea filed on their behalf; (*iii*) the District Court misapplied the private and public interest factors; and (*iv*) Ethiopia waived its right to seek dismissal on the basis of *forum non conveniens* when it agreed that "the Commission shall be the sole forum for adjudicating claims . . . except for . . . claims filed in another forum prior to the effective date of this [Peace] Agreement." Pet. App. 5a-6a.

On January 24, 2003, the Court of Appeals reversed, upholding Respondents' first argument and hence reaching no others. Pet. App. 1a-9a. The Court first reviewed the terms of Article 5, including the carve-out of Article 5(8), and the mandate of the Claims Commission. Pet. App. 3a. The Court found that the Commission cannot award any relief directly to Respondents. Pet. App. 6a. The Court noted that although Eritrea may bring claims on behalf of Respondents, "Eritrea would presumably control the disposition of any resulting award," and was not bound by any stated intention to give directly to the claimants any award received for takings of private property. Pet. App. 6a-7a. Noting further that Eritrea had itself advised the Commission that "practical difficulties of individual distribution might outweigh the desirability of individualized compensation," the Court concluded that "Ethiopia is unable to substantiate its claim that Nemariam will receive a remedy if Eritrea succeeds in prosecuting her claim before the Commission." Pet. App. 7a-8a. The Court therefore held the Commission an inadequate alternative forum for purposes of the threshold requirement of forum non conveniens analysis, as "the 'remedy provided by the alternative forum is so clearly inadequate or unsatisfactory that it is no remedy at all.'" Pet. App. 8a (quoting *Piper Aircraft v. Reyno*, 454 U.S. 235, 254 (1981)).

On April 18, 2002, the Court of Appeals denied Petitioners' petition for rehearing or rehearing en banc, no member of the Court having requested a vote. On May 21, 2003, the Court of Appeals denied Petitioners' request for a stay of the mandate pending this Court's ruling on their petition for certiorari.

REASONS FOR DENYING THE PETITION

The decision of the Court of Appeals represents a straightforward application of well settled principles of *forum non conveniens* that Petitioners do not contest, and it arises in circumstances that will rarely if ever recur. The decision does not conflict with any decisions of this Court or of any other Court of Appeals, and it does not conflict with U.S. policies regarding state espousal of claims before international tribunals, international arbitration generally, or the assertion in U.S. courts of claims arising outside the United States. The proceedings below did not depart from the accepted course of judicial proceedings. The decision below does not raise an important federal question that this Court should settle. In short, the Petition invokes none of the considerations favoring a grant of certiorari listed in Rule 10 of the Rules of the Supreme Court of the United States, and it should be denied.

I. THE DECISION BELOW DOES NOT CONFLICT WITH *PIPER* OR ANY OTHER *FORUM NON CONVENIENS* DECISION OF THIS COURT OR ANY OTHER CIRCUIT.

A. The Decision Reflects a Routine Application of *Piper*.

Petitioners assert that the decision below is "in conflict with this Court's decision in *Piper*." Pet. 8 (point heading I). Petitioners identify no legal standard set forth in *Piper* that the Court of Appeals misstated or failed to apply, however. To the contrary, Petitioners concede that the Court of Appeals "quot[ed] the applicable language from *Piper* (454 U.S. at 254)." Pet. 17 (noting also that the Court of Appeals "quoted the *Piper* standard"). In other words, Petitioners merely quibble with the application of a legal standard that

they concede was both relevant and correctly stated. Petitioners are wrong in their criticism of the Court of Appeals, but in any event the application of a well settled legal standard to particular facts does not warrant review by this Court.

The federal doctrine of *forum non conveniens* was settled by this Court's decisions in *Gulf Oil v. Gilbert*, 330 U.S. 501 (1947), and *Piper Aircraft Co. v. Reyno*, 454 U.S. 235 (1981). As this Court held in *Piper*, and as Petitioners acknowledge, *forum non conveniens* analysis is a two-step inquiry. The threshold determination for *forum non conveniens* is whether an adequate alternative forum is available to the plaintiffs. Pet. 10-11 (quoting *Piper* at 255, n.22 ("At the outset of any *forum non conveniens* inquiry, the court must determine whether there exists an alternative forum")); *see also id.* 10 (adequate alternative forum is "threshold issue"); *El-Fadl v. Central Bank of Jordan*, 75 F.3d 668, 676 (D.C. Cir. 1996) ("the district court must first establish that there is an adequate alternative forum"); *Pain v. United Technologies Corp.*, 637 F.2d 775, 783 (D.C. Cir. 1980) ("At the outset, both *Gilbert* and *Koster* [*v. Lumbermens Mutual Casualty Co.*, 330 U.S. 518 (1947)] require that two alternative forums have jurisdiction over the subject matter and parties in the suit before the doctrine of *forum non conveniens* even comes into play.").

It is well-settled that if the movant does not establish the availability to plaintiffs of an adequate alternative forum, the motion to dismiss on ground of *forum non conveniens* must be denied without further analysis. *See, e.g., El-Fadl*, 75 F.3d at 677, 679 (looking only to availability of adequate alternative forum when finding district court erred in dismissing complaint on *forum non conveniens* grounds because "only if there is an adequate alternative forum must the court then weigh the relative conveniences to the parties

against the presumption of the plaintiff's forum selection") (citing *Pain*); *In re Air Crash Disaster Near New Orleans*, 821 F.2d 1147, 1169 (5th Cir. 1987) ("Since the district court correctly concluded that an alternative forum was unavailable, there was no need for it to proceed to a balancing of the private and public interest factors"), *vacated on other grounds by Pan Am. World Airways, Inc. v. Lopez*, 490 U.S. 1032 (1989). If, however, an adequate alternative forum exists, then the court moves to the second step of the analysis, a balancing of the relevant public and private interest factors identified in *Gilbert* to measure the convenience of the forum and of the litigants. *See Piper*, 454 U.S. at 241 (citing *Gilbert*, 330 U.S. at 508-509).

In reaching its decision, the Court of Appeals cited *Piper* and followed this well-established legal analysis. Pet. 5a–9a. In holding that the remedy offered by the Claims Commission was "so clearly inadequate or unsatisfactory that it is no remedy at all," the Court of Appeals directly applied *Piper*. Pet. 8a; *see also Piper*, 454 U.S. at 254 n.22 ("[W]here the remedy offered by the other forum is clearly unsatisfactory, the other forum may not be an adequate alternative, and the initial requirement may not be satisfied").

Petitioners do not contest the legal principles applied by the Court of Appeals, but instead offer scattershot criticisms of the application of that standard to the facts of this case. While those criticisms could not justify a writ, they are in any event wholly unfounded.

First, Petitioners contend that the Court of Appeals did not "evaluat[e] the adequacy of the forum based on the circumstances of this case," Pet. 11, that it did not consider various factors, Pet. 16, and that its conclusion "is not supported by any analysis," Pet. 17. They thereby ignore the

Court's detailed examination of the Claims Commission and Eritrea's position there. *See* Pet. App. 5a-9a. Specifically, while Petitioners argue that the Court of Appeals failed to consider "the unlikelihood that Eritrea will in fact make such a setoff" and "Eritrea's express statement to the Claims Commission that awards should go to the parties sustaining the damages," Pet. 12, the Court directly addressed both points. With respect to the former point – for which Petitioners present no support – the Court determined that "[i]t is irrelevant whether the Commission currently contemplates that any awards to the respective governments will be set off by them against each other. What matters is that Eritrea and Ethiopia have that option." Pet. App. 7a. On the latter point, the Court concluded that "Ethiopia is unable to substantiate its claim that Nemariam will receive a remedy if Eritrea succeeds in prosecuting her claim before the Commission." *Id.*[1]

Second, Petitioners contend that the decision of the Court of Appeals conflicts with *Piper* because it failed to "mak[e] an analysis of the appropriateness of the dismissal under the balancing factors established by this Court in *Gilbert*," Pet. 11, and thereby effected a "*per se* disqualification" of

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[1] Petitioners also incorrectly argue that the Court of Appeals should have considered whether a condition on the dismissal might have cured the inadequacy of the Claims Commission. Pet. 16. Petitioners did not suggest such a condition below, nor do they do so here, and it is difficult to conceive of an effective condition in this case. As the Second Circuit observed, "the [conditional dismissal] mechanism is not a substitute for the initial 'justifiable belief' of adequacy. Conditions cannot transform an inadequate forum into an adequate one." *Bank of Credit & Commerce Int'l (Overseas) Ltd. v. State Bank of Pak.*, 273 F.3d 241, 248 (2d Cir. 2001) (vacating dismissal and remanding because subsequent change in law upon which district court had relied in concluding that Pakistan was an adequate alternative forum rendered that determination uncertain).

interstate tribunals in violation of the "twin principles of flexibility and trial court discretion that this Court required in *Piper*," Pet. 16. That criticism ignores the well settled two-step analysis that Petitioners elsewhere accept. The Court of Appeals reversed the District Court's decision because Petitioners had failed to establish an adequate alternative forum available to Respondents. Pet. App. 8a, *citing Piper*, 454 U.S. at 254. Accordingly, pursuant to *Piper* and *Gilbert*, the Court of Appeals properly refrained from reviewing the District Court's analysis of the *Gilbert* factors: "Because we conclude that the district court abused its discretion in determining that the Commission was an adequate alternative forum we do not reach Nemariam's other arguments." Pet. App. 9a.[2]

B. The Decision Does Not Conflict with Any Other Decisions of the Courts of Appeals.

Petitioners argue that the decision of the Court of Appeals "creates a conflict among the circuits with respect to

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[2] The Court stated in *Piper* that "if central emphasis were placed on any one factor, the *forum non conveniens* doctrine would lose much of the very flexibility that makes it so valuable." *Piper*, 454 U.S. at 249-50. It did not make that statement in the course of determining whether an adequate alternative forum existed, which was not at issue in *Piper*, but instead while discussing the public and private convenience factors of *Gilbert*, *Koster*, 330 U.S. 518 and *Williams v. Green Bay & W.R. Co.*, 326 U.S. 549 (1946). Courts referring to *Piper*'s "flexible approach" have recognized that it applies to the second prong of the *forum non conveniens* analysis. *See, e.g., DiRienzo v. Phillip Servs. Corp.*, 294 F.3d 21, 29 (2d Cir. 2002), *cert. denied*, 537 U.S. 1028 (2002); *Iragorri v. Int'l. Elevator, Inc.*, 203 F.3d 8, 12 (1st Cir. 2000) (citing *Piper*); *Chukwu v. Air France*, 218 F. Supp. 2d 979, 987 (N.D. Ill. 2002); *Gupta v. Austrian Airlines*, 211 F. Supp. 2d 1078, 1085 (N.D. Ill. 2002); *Doe v. Sun Int'l Hotels, Ltd.*, 20 F. Supp. 2d 1328, 1330 (S.D. Fla. 1998).

the standard for determining the adequacy of the foreign tribunal." Pet. 17. Given Petitioners' acknowledgement that the Court of Appeals applied the *Piper* standard, that argument is wrong on its face unless Petitioner could identify another Court of Appeals that has repudiated or deviated from *Piper*, which they do not even attempt. Nor can they identify a single decision that holds an alternative forum adequate even though the plaintiffs cannot personally appear in the forum, have no personal right to a remedy in the forum, and could receive no remedy even if they prevailed on their claims. The decisions they do cite for the supposed conflict do not even address the issue decided by the Court of Appeals.

First, Petitioners cite *In re Union Carbide Corp. Gas Plant Disaster at Bhopal, India in December, 1984*, 809 F.2d 195 (2d Cir. 1987). In *Union Carbide*, India had adopted a statute that gave its government the exclusive right to represent victims of the Bhopal disaster before courts anywhere. The Court of Appeals affirmed a *forum non conveniens* dismissal in favor of the Indian courts. But no party raised, and the Court of Appeals *did not decide*, whether India's exclusive representation of its nationals rendered its courts an inadequate alternative forum. Because, as the Court of Appeals observed at oral argument here, India's representation "wasn't a basis for the [Second Circuit's] decision," Transcript of Proceedings, dated Oct. 18, 2002, at 28, *Union Carbide* could hardly give rise to a conflict. In any event, the circumstances of that case would have so fundamentally distinguished any holding there that

the case could not have made for a conflict under any circumstances.[3]

Second, Petitioners cite *In re Lloyd's American Trust Fund Litigation*, 954 F. Supp. 656 (S.D.N.Y. 1997). In *Lloyd's*, the District Court rejected plaintiffs' argument that English courts would be inadequate because they had no class action mechanism by which the named plaintiffs could represent others with similar claims, pointing out that the English courts had "other procedural mechanisms" that would serve the purpose. 954 F. Supp. at 673. However, the Court of Appeals did not rest its decision here on Respondents' inability to represent *others* before the Commission, but on the absence of any right to obtain a remedy for *themselves*.

Third, Petitioners cite *Gonzalez v. Chrysler Corp.*, 301 F.3d 377 (5th Cir. 2002), *cert denied*, 123 S. Ct. 1928 (May 5, 2003), in which the Court of Appeals upheld a dismissal

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[3] In *Union Carbide*, plaintiffs challenged the adequacy of the Indian courts only on the grounds that they lacked a class action mechanism and other procedures. 809 F.2d at 198-199. All but a few of the 200,000 plaintiffs were Indian citizens living in India who had revoked their authorizations for American counsel *and chosen to have the government of India represent them. Id.* at 202. The government of India had entered the case as a plaintiff on behalf of all victims of the disaster, "with retainers executed by many of the victims," *id.* at 197-98, and at the time of the appeal no longer opposed the motion to dismiss. *Id.* Moreover, the Bhopal Act granted each claimant a limited right to participate in the proceedings and to have "a legal practitioner of his choice [and at his expense] to be associated in the conduct of any suit or other proceeding relating to his claim." *Bi v. Union Carbide Chemicals and Plastics Co., Inc.*, 984 F.2d 582, 585 (2d Cir. 1993). Finally, far from asserting the right to represent all claimants in all fora, Eritrea here, unlike India in *Union Carbide*, has expressly acted to permit this action to go forward without its involvement.

on the ground of *forum non conveniens* in favor of the Mexican courts. In *Gonzalez*, the plaintiff could have pursued a case directly in Mexico, but under Mexican law the potential remedy was severely limited. The Fifth Circuit held that the Mexican court was adequate because it would provide the plaintiff a remedy, even if *de minimis*, and "the adequacy inquiry under *Piper Aircraft* does not include an evaluation of whether it makes economic sense for Gonzalez to file this lawsuit in Mexico." *Id.* at 383.

The Court of Appeals, however, expressly distinguished *Gonzalez*, without questioning its holding or analysis in any way. The Court recognized, in accord with *Gonzalez*, that "a more limited recovery than is available in plaintiffs' forum of choice does not automatically make the alternative forum inadequate." Pet. App. 8a.[4] It pointed out, however, that "[i]n this case, Ethiopia cannot assure Nemariam of recovering any award at all, even if the Commission upholds her claim in full." Pet. App. 8a. Hence, the Court of Appeals concluded, "we fail to see how an alternative forum in which the plaintiff can recover nothing for a valid claim may also be deemed adequate." Pet. App. 8a.

Finally, Petitioners cite a series of decisions for the unremarkable proposition that a *forum non conveniens*

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[4] *See also Lueck v. Sundstrand Corp.*, 236 F.3d 1137 (9th Cir. 2001) (New Zealand administrative law system offered adequate alternative forum although the amount plaintiffs would recover was significant less than in U.S. courts); *Lockman Found. v. Evangelical Alliance Mission*, 930 F.2d 764, 768-69 (9th Cir. 1991) (lesser recovery does not render forum inadequate); *de Melo v. Lederle Labs.*, 801 F.2d 1058, 1061 (8th Cir. 1986) (lesser recovery does not render forum inadequate); *Alcoa S.S. Co. v. M/V Nordic Regent*, 654 F.2d 147, 159 (2d Cir. 1980) (*en banc*) ("the prospect of a lesser recovery does not justify refusing to dismiss on the ground of *forum non conveniens*").

dismissal may be appropriate "even when the alternative forum does not provide the same procedural guarantees as a U.S. court." Pet. 19. The Court of Appeals did not discuss either the proposition or the cases reflecting it, however, for the simple reason that they are wholly irrelevant to the issue it decided.[5] Respondents' challenge to the adequacy of the Claims Commission was not based on mere procedural differences between the fora, but on the undisputed fact that "the Commission cannot award any relief directly to" the Respondents. Pet. App. 6a. A right to a remedy is not a procedural nicety.

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[5] In each of the cases, plaintiffs had direct access to the alternative forum and a right to receive directly any relief awarded. *See Gschwind v. Cessna Aircraft Co.*, 161 F.3d 602, 606-07 (10th Cir. 1998) (plaintiff could bring action against defendants in French courts); *Scottish Air Int'l, Inc. v. British Caledonian Group, PLC*, 81 F.3d 1224, 1234-35 (2d Cir. 1996) (plaintiffs could bring claims in English courts); *Lueck*, 236 F.3d at 1144 (9th Cir. 2001) ("plaintiffs . . . can file and have claims filed with" New Zealand no-fault accident compensation scheme for remedy); *Aguinda v. Texaco, Inc.*, 142 F. Supp. 2d 534, 540 (S.D.N.Y. 2001) (Ecuadorian law "expressly provides that persons injured . . . may sue in Ecuadorian courts"), *modified and aff'd*, 303 F.3d 470 (2d Cir. 2002); *Jeha v. Arabian American Oil Co.*, 751 F. Supp. 122, 125-126 (S.D. Tex. 1990) (claim "[could] be filed [in Saudi Arabian courts] either by an attorney for the claimant or by the claimant *pro se*"), *aff'd without opinion*, 936 F.2d 569 (5th Cir. 1991). Petitioners miscite *In re Air Crash Disaster Near New Orleans*, 821 F.2d 1147. Pet. 19. There, the Fifth Circuit held that dismissal for *forum non conveniens* was not appropriate because the alternative forum did not have jurisdiction over the United States as a defendant. Petitioners also omit from their quotation from that case the one phrase relevant to the decision here. *Compare* Pet. 19 *with* 821 F.2d at 1165 ("A foreign forum is adequate *when the parties will not be deprived of all remedies or treated unfairly*, even though they may not enjoy the same benefits as they might receive in an American court.") (omitted passage in italics).

II. THE DECISION OF THE COURT OF APPEALS DOES NOT EFFECT A "*PER SE* DISQUALIFICATION OF STATE-TO-STATE ARBITRAL TRIBUNALS PREMISED ON STATE ESPOUSAL" OR PRESENT ANY CONFLICT WITH POLICIES OR DECISIONS REGARDING SUCH TRIBUNALS.

A. The Decision Has No Effect on Tribunals Premised on State Espousal of Nationals' Claims.

Given a *holding* that reflects a conventional application of settled *forum non conveniens* principles to particular facts, Petitioners argue that "the *effect* of the ruling below is to impose a *per se* disqualification of . . . state-to-state arbitral tribunals [based on state espousal] as alternative forums in a *forum non conveniens* analysis." Pet. 12 (emphasis added); *see also* Pet. 21-23; Pet. 23 (decision below "gratuitously undermines the authority and credibility of the Claims Commission"); Pet. 24 (decision below "inevitably calls into question the validity of state-to-state tribunals for the resolution of" international claims). The decision announced no such "*per se* disqualification," and Petitioners' faulty prediction provides no basis for a grant of certiorari.

First, the holding and analysis of the Court of Appeals would be irrelevant to any tribunal in which nationals of one state could pursue directly their claims against another state. As even Petitioners concede, states "can" establish fora "in which private parties are permitted to pursue their own claims." Pet. 13 n.7. In fact, states regularly do. "For example, the Algiers Accords establishing the Iran-United States Claims Tribunal made such a provision for private claims in excess of $250,000." Pet. 13 n.7; *see also* Declaration of the Government of the Democratic and Popular Republic of Algeria, Jan. 19, 1981, 20 I.L.M. 223,

224 (creating Iran-United States Claims Tribunal) (the "Algiers Accords"). Private claimants before the Iran-U.S. Claims Tribunal thus have the precise rights and protections that the Court of Appeals in this case found lacking in the Claims Commission.

The Iran-U.S. Claims Tribunal is by no means unique in this respect. Chapter 11 of the North American Free Trade Agreement among the United States, Canada, and Mexico permits nationals of one of those states to pursue claims against another of those states arising from investments in that state. *See* North American Free Trade Agreement, Dec. 17, 1992, arts. 1115-20, 32 I.L.M. 296 & 32 I.L.M. 605, 642-43. Similarly, the Convention on the Settlement of Investment Disputes Between States and Nationals of Other States, established the International Centre for Settlement of Investment Disputes as a mechanism by which States could agree that they would arbitrate investment claims directly with foreign investors. *See* Convention on the Settlement of Investment Disputes Between States and Nationals of Other States, Mar. 18, 1965, art. 25(1), 17 U.S.T. 1270, 1280, 575 U.N.T.S. 159, 174. For a final example, in the last half-century, the United States and many other nations throughout the world have entered into literally thousands of bilateral investment treaties, or BITs, which almost uniformly provide for direct investor-State arbitration to resolve investment claims. *See Dispute Settlement: Investor-State*, U.N. Conference on Trade and Development, at 41, U.N. Doc. UNCTAD/ITE/IIT/30 (2003), *available at* http://www.unctad.org/en/docs//iteiit30_en.pdf (noting that 2,099 BITs had been concluded as of January 1, 2002). By its terms, the decision of the Court of Appeals would provide no support to a plaintiff in a United States court defending against a motion to dismiss on *forum non conveniens* grounds in favor of an international tribunal in which that plaintiff could bring his or her own claims.

Second, the decision of the Court of Appeals has no effect on the ability of states to establish international fora in which the states espouse their nationals' claims to the exclusion of direct claims by those nationals in other fora. The Court of Appeals did not address principles of state espousal generally, and it did not rest its holding on any general view of the adequacy of interstate tribunals to resolve international claims by state espousal. To the contrary, it rendered its decision in the unique context of Article 5(8) of the Agreement, in which the States Party established an interstate claims commission in which they may espouse their nationals' claims, but at the same time, by Article 5(8), expressly provided that certain claimants could also proceed with their claims directly against the defendant state in a national court. Pet. App. 31a (Commission "sole forum" except for claims "filed in another forum prior to the effective date of [the] Agreement").

Given the circumstances created by Article 5(8), the Court of Appeals had no occasion to address a situation in which the States Party had not provided for the concurrent jurisdiction of a national court. Specifically, the decision nowhere suggests that where, unlike Eritrea and Ethiopia, states have agreed that nationals' claims would be heard exclusively by state espousal before an international tribunal, a U.S. court would still permit a national to proceed outside that tribunal. The Court of Appeals did not address that issue for the simple reason that, in light of Article 5(8), the issue could not arise. Petitioners implicitly recognize that fatal flaw in their "per se disqualification" argument by failing in their Petition to so much as mention Article 5(8), Ethiopia's agreement there that the Claims Commission would not be the exclusive forum for Respondents' claims, or the import of Ethiopia's agreement to Article 5(8) for the central argument of the Petition.

Hence, far from "disqualifying *per se*" interstate fora based on state espousal, the decision of the Court of Appeals stands for a much more carefully defined – and plainly correct – proposition: where a respondent state has agreed that certain claims against it, which are within the jurisdiction of an interstate claims commission operating by state espousal, may also go forward in a U.S. court, that state cannot defeat the right of a plaintiff to proceed in the U.S. court by arguing on a *forum non conveniens* motion that the commission, in which the plaintiff cannot appear and from which the plaintiff has no right to a remedy, constitutes an adequate alternative forum.

Finally, because in the realm of interstate claims commissions, the carve-out of Article 5(8) is unique, and concurrent jurisdiction itself is exceedingly rare, if not unique, the decision of the Court of Appeals could not possibly have the impact Petitioners attempt to conjure. In every example provided by Petitioners, the interstate claims commission established by interstate argument, unlike the Claims Commission here, was to have *exclusive* jurisdiction over the claims it was authorized to resolve. Pet. 15; *see, e.g.*, United States-Mexico General Claims Convention, T.S. 678, Arts. I, VIII (Sept. 8, 1923) (creating Commission to resolve United States-Mexico claims and barring claims not brought before that Commission); Chilean-U.S. Claims Commission of 1892 Convention for the Settlement of Claims, Aug. 7, 1892, U.S.-Chile, art. I, T.S. 42 (creating Claims Commission for "[a]ll claims" between the United States and Chile). In other words, the States Party agreed that claims against a respondent state could not proceed outside the exclusive forum, including in a national court.

Needless to say, the predicate of a *forum non conveniens* motion is the plaintiff's right otherwise to proceed in the chosen forum. Hence, before reaching any *forum non*

conveniens application, a U.S. court faced with a plaintiff whose state had agreed that some other forum would have exclusive jurisdiction over the claim would first have to hold that that agreement did not bind the plaintiff. Yet Petitioners cite not a single case in which a U.S. court allowed a claimant to proceed against a defendant state when the claimant's state had agreed with the defendant state to give exclusive jurisdiction over claims against that state to another forum.

The authority Petitioners do cite, albeit for other purposes, would provide no support for such a holding. "The United States has itself on numerous occasions as part of the settlement of disputes with foreign nations required that the claims of United States citizens to [sic] be prosecuted *only* through governmental espousal before a tribunal established for the purpose." Pet. 14 (emphasis added). In *Dames & Moore v. Regan*, 453 U.S. 654 (1981) (cited at Pet. 14, 15-16, 21-22, 23-24, 25), this Court upheld the President's authority to suspend claims against Iran by U.S. nationals in U.S. courts and require that they be brought instead before the Iran-United States Claims Tribunal in accordance with the President's executive agreement with the government of Iran, which established that Tribunal as the exclusive forum for the claims. Similarly, in *Abrahim-Youri v. United States*, 139 F.3d 1462 (Fed Cir. 1997) (cited at Pet. 15-16, 22-23), the Federal Circuit affirmed the dismissal of actions by U.S. nationals seeking additional recovery from the United States after the President, implementing the Algiers Accords, settled a class of claims against Iran then pending before the Tribunal. *See also Asociacion de Reclamantes v. United Mexican States*, 735 F.2d 1517 (D.C. Cir. 1984) (affirming dismissal of claims by Mexican nationals against Mexico for compensation received by Mexico in settlement of claims against the United States).

In short, Petitioners can establish no impact from the decision because (a) the carve-out provision recognizing concurrent jurisdiction, which makes possible a *forum non conveniens* issue, is rare, if not unique to the Eritrea-Ethiopia Agreement, and (b) in the rare circumstances in which U.S. courts have had to address the issue, they have given no indication that they would permit claims against respondent states to go forward where the claimant's state has instead agreed to grant exclusive jurisdiction over the claims to an international claims commission. Petitioners provide final and conclusive proof of the *sui generis* character of the question presented by failing to identify a *single* decision in which any court has *ever* dismissed a case on *forum non conveniens* grounds in favor of an international claims tribunal, or, indeed, any other decision in which a court has even had to address the issue. In other words, on Petitioners' own terms, the decision will have no impact whatsoever.

B. The Decision Does Not Conflict with U.S. Policy or Other Decisions Regarding Interstate Dispute Resolution, Arbitration or Foreign Claims.

Petitioners argue finally that the decision of the Court of Appeals conflicts with U.S. policy in favor of interstate dispute resolution, U.S. policy in favor of arbitration and an alleged U.S. policy against permitting the settlement of "foreign" claims in U.S. courts. Pet. 23-29. Conflicts defined in such amorphous terms are not the stuff of which grants are made, but in any event the decision does not so conflict.

First, far from conflicting with any U.S. policy favoring the establishment of claims commissions to settle interstate disputes, the decision below *advances* the U.S. express interest in the settlement of the Ethiopia-Eritrea conflict. The United States helped negotiate the Agreement, and the

State Department played a central role in negotiating the carve-out in Article 5(8) that recognized the U.S. courts' concurrent jurisdiction over Respondents' claims. Resp. App. 3a-4a, 7a-8a. The Court of Appeals simply ensured that the District Court would exercise the jurisdiction that the States Party recognized.

The decision also poses no conflict with *Dames & Moore* or *Abrahim-Youri*, neither of which even involved *forum non conveniens*. Pet. 21-23. In *Dames & Moore*, this Court did not do anything so ill-defined as to "uphold the use of such a [state espousal] tribunal." Pet. 21. To the contrary, there "this Court upheld the President's suspension of U.S. nationals' lawsuits against Iran and the requirement that their claims be brought instead before the Iran-United States Claims Tribunal, in accordance with the President's agreement with the government of Iran." Pet. 15; *see Dames & Moore*, 453 U.S. at 688 (holding that the President was authorized to bar domestic litigation pursuant to the Algiers Accords with Iran). In *Abrahim-Youri*, 139 F.3d at 1466, the Court held that U.S. extinguishment of certain claims of U.S. nationals in a 1990 lump-sum settlement with Iran as part of the exclusive dispute resolution procedures established by the Algiers Accords was not an unconstitutional taking. The decision of the Court of Appeals cannot create a conflict with decisions that do not even deal with the same subject matter.

Second, Petitioners contend that the decision conflicts with U.S. policy "favor[ing] the resolution of disputes by arbitral tribunals." Pet. 26. Petitioners forget that "[t]he 'liberal federal policy favoring arbitration agreements' manifested by [the Federal Arbitration Act] is at bottom a policy guaranteeing the enforcement of private contractual arrangements." *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 626 (1985) (internal citation

omitted). U.S. policy and U.S. law do not "mandate the arbitration of all claims, but merely the enforcement – upon the motion of one of the parties – of privately negotiated arbitration agreements." *Dean Witter Reynolds, Inc. v. Byrd*, 470 U.S. 213, 219 (1985). Ethiopia agreed in Article 5(8) that this case could go forward outside the Commission, and it hardly conflicts with U.S. arbitration policy to give effect to that agreement.

Finally, Petitioners suggest that there is some U.S. policy against hearing foreign claims in U.S. courts pursuant to the FSIA. Pet. 29. The only U.S. policy about hearing claims under the FSIA is reflected in the provisions of the FSIA itself, but the District Court has not even reached Petitioners' motion to dismiss for lack of subject matter jurisdiction under that statute. The decision cannot create a conflict on the policy or interpretation of a statute it does not address. Similarly, the views of the United States expressed as *amicus curiae* in the rehearing of *Doe v. Unocal Corp.*, 248 F.3d 915 (9th Cir. 2001), *reh'g en banc granted*, -- F.3d --, 2003 WL 359787 (9th Cir. Feb. 14, 2003) (quoted at Pet. 28-29), which have not been adopted by any court, addressed the Alien Tort Claims Act, on which Respondents do not base any claim. In any event, any concern about the manufacture of causes of action to allow foreign tort claims to be heard in the United States would not apply to this FSIA takings action, where the cause of action is specified in the statute and well established in law. *See* 28 U.S.C. 1605(a)(3); *see also Siderman de Blake v. Republic of Argentina*, 965 F.2d 699, 711-12 (9th Cir. 1992) (stating established standards for the international takings claim specified in FSIA).

CONCLUSION

The Petition for a Writ of Certiorari should be denied.

Respectfully Submitted,

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